



U.S. Citizenship
and Immigration
Services

B4

FILE: WAC 01 280 56462 Office: CALIFORNIA SERVICE CENTER Date: SEP 17 2004

IN RE: Petitioner:
Beneficiary

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, who subsequently reopened and affirmed his decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is sells and restores fine porcelain and art objects. It seeks to employ the beneficiary permanently in the United States as a painter on-glaze. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 1, 1996. The proffered wage as stated on the Form ETA 750 is \$23.17 per hour, which amounts to \$48,193.60 annually.

The record of proceeding (ROP) is voluminous but all documents have been reviewed and analyzed by the AAO. Pertinent documents submitted into the ROP relating to the petitioner's ability to pay the proffered wage are its federal income tax returns on Form 1120, U.S. Corporation Income Tax Return. The ROP contains the petitioner's tax returns for the years 1995 through 2001.¹

¹ The petitioner's fiscal tax year runs from August 1 through July 31. Thus, the petitioner's 1995 tax return covers August 1, 1995 through July 31, 1996, and is relevant to the priority date of 1996. The petitioner's 1996 tax return would cover August 1, 1996 through July 31, 1997. The petitioner's 1996 tax return, however, is missing from the ROP.

The petitioner's tax returns reflect the following information:

	<u>2001</u>	<u>2000</u>	<u>1999</u>	<u>1998</u>
Gross receipts	\$389,608	\$498,162	\$360,000	\$360,939
Salaries paid	\$23,300	\$32,116	\$20,442	\$19,814
Net income ²	-\$64,457	-\$2,189	\$52,699	-\$29,826
Current Assets	\$48,478	\$45,500 ³	\$31,697	\$31,965
Current Liabilities	\$68,499	\$53,276	\$0	\$45,936
Net current assets	-\$20,021	-\$7,776	\$31,697	-\$14,000
	<u>1997</u>	<u>1995</u>		
Gross receipts	\$421,564	\$488,464		
Salaries paid	\$23,779	\$43,426		
Net income	\$31,373	\$53,820		
Current Assets	\$45,134	\$n/a ⁴		
Current Liabilities	\$20,675	\$n/a		
Net current assets	\$24,459	\$n/a		

In addition to the petitioner's tax returns, other pertinent financial documents contained in the ROP include quarterly wage reports for the quarters ending September 20, 2000, March 31, 2001, June 30, 2001, and December 31, 2001. Those reports reflect that the petitioner actually employed and paid the beneficiary wages in the total amounts of \$5384 in 2000 and \$14,965.50 in 2001. The petitioner provided those financial documents, among other items, in response to the director's request for evidence dated December 26, 2001.⁵ Additionally, in response to the director's notice of intent to deny the petition, the petitioner provided copies of the beneficiary's Forms W-2, Wage and Tax Statements, for the years 1998 through 2001. The W-2 forms reflect that the petitioner actually employed and paid the beneficiary wages in the following amounts for the years 1998 through 2001, respectively: \$18,836, \$21,454.50, \$21,356.50, and \$20,135. The petitioner also submitted copies of bank account records and proof of the petitioner's owner's assets.

Also contained in the ROP are copies of customer invoices and articles describing the petitioner's owner's work and art assets. The petitioner's counsel describes the petitioner's owner as:

² Taxable income before net operating loss deduction and special deductions on Line 28.

³ This figure is approximate as the photocopy of Schedule L to the petitioner's 2000 tax return contained in the ROP is crooked and cuts off some digits.

⁴ Only the first page of the petitioner's 1995 tax return was submitted into the ROP.

⁵ In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The petitioner produced its 1998 and 2000 tax returns in response to this request, which were discussed above.

a celebrity as a Master Wedgwood Potter around the world. His works have been exhibited at the [REDACTED] and at the Serpentine Gallery, London, among others.

In 1994, Prince Charles of England visited [the petitioner] in Los Angeles. The visit has been well documented by the British-American Chamber of Commerce, and national media.

Newspaper articles, a letter from Prince Charles's office, and photographs and other supporting documents corroborate counsel's assertion that the petitioner's owner receives solicitations from famous individuals offering large sums of money for the petitioner's products and that he is a reputable artist and restorer.⁶

In separate correspondence, counsel also asserts the following:

[The petitioner's owner] is an avid pottery collector himself. His famous private collection consists of mainly English and other European porcelain, has been built up over many decades and represents a considerable instantly sellable cash investment.

The collection of Wedgwood, Doulton, and Staffordshire [sic] pieces are of museum quality. Along with this bronzes, and unique glass collection, the estimated value is well over \$500,000.

...

[The petitioner's owner's] plan for the future is saving more of the art pieces and donating them to an art museum. However, if and when it is necessary, he would definitely sell some of the artwork he owns, to keep his business running. Without artists like [the beneficiary], [the petitioner's owner] would not be able to run his business successfully.

The petitioner's owner also presented a letter in support of the instant petition. Excerpts from that letter state the following:

The main profile of my business is restoration, repair of porcelain, ceramics, crystal, and fine art objects. I also specialize in crystal engraving.

Many times, I have been challenged by my valued customers to create one of a kind ceramics or porcelain products (plates, figurines, vases, etc.) for them. In the trade I have made my name as a "Wedgwood Master Potter." I have been featured on television in Britain, North America, and Europe, and has [sic] been giving demonstrations of the age old art of hand throwing at the wheel and hand ornamentation of Wedgwood's world-famous Jasperware.

⁶ A Google search of the Internet results in the petitioner's phone and address listings only.

I am the grandson of a painter and son of a pottery salesman who received a medal from the Queen of England in recognition of his [sic] work. . . . Prior to opening my own business in California, I had worked as a ceramic designer for Wedgwood since 1970.

I have become a celebrity on my own right by demonstration the making of Wedgwood around the world.

As a creative artist, as well as a businessman, I wish to provide a steady and constant flow of unique art pieces to my customers. Presently I can fulfill considerably more, but still not enough customer requests. Modeling art objects is a lengthy and painstaking process.

By employing more experienced painters, I can fulfill my customer's requests. My business is in the West Hollywood area, where most of the celebrities of the entertainment industry live. People buy our creations for their beauty, but also buy them because it is a very good investment: the price of a plate produced in 1969 was \$12.95, and today it is \$1,000.

On November 3, 1994, his Royal Highness, [REDACTED] paid a visit to my shop. There are celebrities among my customers, such as former Los Angeles Mayor, [REDACTED]

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on May 30, 2002, denied the petition. The director subsequently reopened the matter and requested additional evidence. The director affirmed its prior decision to deny the petition on June 16, 2003.

On appeal, counsel asserts that the petitioner's owner's reputation and assets should be considered in connection with the petitioner's ability to pay the proffered wage. Counsel also raises an additional issue, both on appeal, and previously in response to a request for evidence. The underlying labor certification application in this case was initially filed with a proffered wage of \$11.00 per hour. The Department of Labor (DOL) sent the petitioner a deficiency notice and requested the petitioner to amend the proffered wage to \$23.17 per hour in order to meet the prevailing wage rate for a level 2 painter (on-glaze). The petitioner complied and initialed the amendment to verify that he would offer the proffered position at the prevailing wage rate of \$23.17 per hour. Counsel states that the DOL inexplicably, and unfairly, suddenly doubled the prevailing wage rate during their processing of the labor certification application, which has now been dropped back to \$11.05 to more accurately reflect the reality of market wages for painters on-glaze. Counsel acknowledges that the proper procedure for remedying that situation is a re-filing of the labor certification application at the DOL with the now prevailing wage rate of \$11.05. Counsel states that the petitioner has been paying the beneficiary at the lower wage rate as well as other employees holding positions of similar capacity. The AAO researched the prevailing wage rate in this case and determined that in the year 2001, which was as far back as the On-Line Wage (OLW) Library's⁷ database could go, the prevailing wage

⁷ DOL maintains a website at www.ows.doleta.gov which provides access to OWL. OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically.⁷ The prevailing wage rates are broken down into two skill levels. DOL already certified the proffered position in the instant petition as Level 2.

rate was \$11.47 per hour for a level 2 painter on-glaze. The OLV database reflects that the prevailing wage rate in 2004 is \$10.84 per hour for a level 2 painter on-glaze, thus illustrating a continuing drop in wages.⁸ Counsel also presented multiple prevailing wage request forms issued to and certified by the DOL that corroborate her assertions. The AAO is convinced that counsel's assertion is correct. However, Citizenship and Immigration Services (CIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Additionally, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Additionally, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Thus, the private art collection held by the petitioner's owner's may not be considered within the scope of the petitioner's ability to pay the proffered wage to the beneficiary for purposes of employment-based immigration sponsorship.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it employed and paid the beneficiary wages in 1998, 1999, 2000, and 2001. The wages actually paid to the beneficiary, however, were not in the amount of the full proffered wage regardless of whether the annual wage of \$49,193 or \$22,984⁹ is used. Using the proffered wage, which was certified on the labor certification application, the petitioner must still show that it can pay remaining wages of \$30,357, \$27,836.50, and \$29,058, respectively, for the years of 1998, 2000, and 2001. The petitioner has illustrated its ability to pay the proffered wage in 1995 and 1999 as will be discussed below so wages actually paid are irrelevant to those years.

⁸ This could merely reflect a market trend in devaluation of a painter on-glaze's market worth.

⁹ \$22,984 would be the annual wage rate at \$11.05 per hour.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Counsel's reliance on the petitioner's gross receipts is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income.

The petitioner's net income in 1995 of \$53,820 and 1999 of \$52,699 is sufficient to pay the proffered wage of \$49,193. Thus, the petitioner has demonstrated its ability to pay the proffered wage in those years. The petitioner's net income in 1998, 2000, and 2001 was negative. Thus, the petitioner has not demonstrated its ability to pay the proffered wage out of its net income during those years, regardless of whether or not the proffered wage of \$49,193 or \$22,984 is used.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹⁰ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the years in question, 1998, 2000, and 2001, however, were negative.

Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or

¹⁰ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

The petitioner and counsel have failed to establish that the facts of the instant petition are analogous to *Sonegawa*. The petitioner in the instant petition has presented substantial evidence of its reputation and clientele. The petitioner's owner has not acted upon numerous outstanding solicitations for his products but claims he could make very substantial sales at any time. However, the petitioner has not established that 1998, 2000, and 2001, were unusual years within the context of profitable years. Another factor weighing against the petition's approvability is the fact that the petitioner's actual employment of the beneficiary since 1998 apparently did nothing to increase the petitioner's earnings.¹¹

The petitioner has produced no evidence of its ability to pay the proffered wage in 1996, and shows negative net income and net current assets for three years out of seven, and thus the weight of the evidence and totality of circumstances suggest that the petitioner cannot prove its ability to pay the proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.

¹¹ See *Masonry Masters, Inc. v. Thornburgh*, 875 F.2nd 898 (D.C. Cir. 1989).